**MANDARIN PAVILION SDN BHD v.**
**CHANG VUI LUN & ANOR**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
ABANG ISKANDAR JCA
YEOH WEE SIAM JCA
[CIVIL APPEAL NO: S-02(A)-705-04-2017]
3 OCTOBER 2018

***REVENUE LAW:*** *Goods and Services Tax – Liability – Goods and Services Tax Act 2014 came into force after developer and purchaser entered into sale and purchase agreement – Whether developer could include Government Service Tax ('GST') in progressive claims for payment– Whether sale and purchase agreement provided for payment of GST – Whether liability to pay GST amount ought to be affixed to developer or purchaser – Goods and Services Tax Act 2014, s. 9(3)*

Pursuant to a sale and purchase agreement ('SPA') dated 1 April 2014, the respondents purchased a property from the appellant, a developer, at the purchase price of RM1,349,000. The said sum was to be paid progressively, based on works completed. The Goods and Services Tax Act 2014 ('the GST Act') came into force on 1 May 2015. The appellant, a GST-registered company under the GST Act, submitted that, with the introduction of the GST legislation, all progressive claims after 1 April 2015 would be subject to GST and payable by the respondents. Premised on that stand, the appellant issued letters of progressive claims which included GST, on 21 January 2016 and 10 May 2016, requesting the respondents to settle the same. The respondents argued that as there was no provision in the SPA providing for the payment of the GST, the appellant could not pass and request for such payment from the respondents. The High Court premised its decision on cl. 25 of the SPA, which states that the appellant was liable to pay any new fees, charges or impositions, in fixing liability on the appellant to pay the payable GST amount. Hence, the present appeal.

**Held (dismissing appeal)**
**Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:**

**(1)** The GST Act is a law of general application imposed on supplier of goods and services, as could be seen from s. 9(3) of the GST Act. Section 9(3) of the GST Act does not provide for the supplier to claim reimbursement of the GST paid from the consumer. For tax legislation, any imposition of tax on anybody must be expressly provided for. There is no equity in tax jurisprudence. In respect of the SPA, there appeared to be no express provision for the appellant to claim reimbursement of the GST paid from the respondent. The appellant was liable to pay the GST chargeable. The appellant had no contractual or statutory right to

recover any GST liability from the respondent. Even if there was any ambiguity in cl. 25 of the SPA, it did not help the appellant as the *contra proferentum* rule applied as it was not disputed that the SPA was prepared by the appellant. The *contra proferentum* rule requires the court to construe any ambiguity in the contract against the party which drafted the ambiguous document. (paras 16-18)

***Bahasa Malaysia** Headnotes*

Berikutan satu perjanjian jual beli ('PJB') bertarikh 1 April 2014, responden-responden membeli sebuah hartanah daripada perayu, iaitu pemaju, dengan harga belian RM1,349,000. Jumlah ini hendaklah dibayar secara berperingkat-peringkat, berdasarkan kerja-kerja yang siap. Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST') berkuat kuasa pada 1 Mei 2015. Perayu, syarikat berdaftar GST bawah Akta GST, menghujahkan, dengan pengenalan perundangan GST, semua tuntutan berperingkat selepas 1 April 2015 akan dikenakan GST dan perlu dibayar oleh responden-responden. Berpegang pada pendirian itu, perayu mengeluarkan surat-surat tuntutan berperingkat yang mengenakan GST, pada 21 Januari 2016 dan 10 Mei 2016, meminta agar responden-responden menyelesaikannya. Responden-responden menghujahkan, oleh kerana tiada peruntukan dalam PJB yang memperuntukkan bayaran GST, perayu tidak boleh meluluskan dan meminta bayaran daripada responden-responden. Mahkamah Tinggi berpandukan kl. 25 PJB, yang memperuntukkan perayu bertanggungjawab membayar apa-apa fi, caj atau pengenaan baharu, dalam meletakkan liabiliti pada perayu untuk membayar jumlah GST yang perlu dibayar. Maka timbul rayuan ini.

**Diputuskan (menolak rayuan)**
**Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:**

**(1)** Akta GST ialah undang-undang pemakaian am yang dikenakan pada pembekal barang-barang dan perkhidmatan-perkhidmatan, seperti yang boleh dilihat dalam s. 9(3) Akta GST. Seksyen 9(3) Akta GST tidak memperuntukkan agar pembekal menuntut bayaran balik GST yang dibayar daripada pengguna. Dalam perundangan cukai, apa-apa pengenaan cukai atas siapa-siapa hendaklah diperuntukkan secara jelas. Tiada ekuiti dalam jurisprudens cukai. Berkenaan PJB, tiada peruntukan nyata untuk perayu menuntut bayaran balik GST yang dibayar daripada responden. Perayu bertanggungjawab membayar GST yang dikenakan. Perayu tiada hak kontraktual atau statutori untuk memperoleh semula apa-apa liabiliti GST daripada responden. Jika pun terdapat kesamaran dalam kl. 25 PJB, ini tidak membantu perayu kerana peraturan *contra proferentum* terpakai dan tidak dipertikaikan bahawa PJB disediakan oleh perayu. Peraturan *contra proferentum* mengkehendaki mahkamah mentafsir apa-apa kesamaran dalam kontrak terhadap pihak yang mendraf dokumen samar tersebut.

**Case(s) referred to:**
*Ma Ong Kee And Another v. Kaiyo Reptile Products Pte Ltd [2001] SGHC 188* ***(refd)***
*Q Sentral Retail Lot 11-2 Sdn Bhd v. Cosy Bonanza Sdn Bhd [2016] 1 LNS 942 HC* ***(refd)***

**Legislation referred to:**
Goods and Services Tax Act 2014, s. 9(3)

Goods and Services Tax Act (Cap 117A) [Sing], s. 8(3)

*For the appellant - Lim Pitt Kong; M/s P K Lim & Co*
*For the respondent - Ryan Soo; M/s Roland Cheng & Co*

*[Editor's note: Appeal from High Court, Kota Kinabalu; Originating Summons No: BKI-24-80/8-2016 (HC2) (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**David Wong Dak Wah CJ (Sabah & Sarawak):**

### Introduction

**[1]** This appeal related to the sole issue of whether the Government Service Tax (GST) is payable by the respondents/plaintiffs in the context of an agreement entered between the appellant/defendant and the respondents prior to the introduction of the Goods and Service Tax Act 2014 (GST Act).

**[2]** The High Court held that no GST was payable by the respondents premised on the learned judge's construction, of cl. 25 of the agreement between the parties, resulting in this appeal.

**[3]** We heard the appeal and dismissed the same. We now give our reasons for our decision.

### Background Facts

**[4]** The appellant is the developer of a project known as the "Austin Business Park Mogonibung" consisting of 53 units of 2-storey and 3-storey shop office.

**[5]** The respondents pursuant to a sale and purchase agreement dated 1 April 2014 (SPA) jointly purchased one unit of 3-storey shop office lot known as Lot 52, Block F, Austin Business Park Mogonibung (the property) from the appellant subject to the term and conditions therein contained for a purchase price of RM1,349,000 which sum is to be paid by way of progressive payments premised on works completed.

**[6]** At the time when the parties entered into the SPA on 1 April 2014, there was no GST Act, which Act only came into force on 1 April 2015.

**[7]** The appellant is a GST registered company under the GST Act.

**Appellant's Position**

**[8]** It is the position of the appellant that with the introduction of the GST legislation, all progressive claims after 1 April 2015 would be subject to GST and payable by the respondents. Premised on that stand, the appellant issued letters of progressive claims which included GST on 21 January 2016 and 10 May 2016 requesting the respondents to settle the same.

**Respondents' Position**

**[9]** The position taken by the respondents is simply this as there is no provision in the SPA providing for the payment of the GST by the respondents, the appellant cannot pass and request for payment of the same from the respondents.

**High Court Dispute**

**[10]** The learned judge in the High Court premised his decision to fix liability on the appellant to pay the payable GST amount on cl. 25 of the SPA, which states that the appellant is liable to pay any new fees, charges or impositions and applied the case of *Q Sentral Retail Lot 11-2 Sdn Bhd v. Cosy Bonanza Sdn Bhd* [2016] 1 LNS 942; [2016] MLJU 1473.

**Our Grounds Of Decision**

**[11]** It was our view that this appeal can be dealt with by construing cl. 25 of the SPA, which reads as follows:

> In the event of the introduction of any new laws, by-laws, rules or regulation which shall be imposed on the Developer, the Developer shall be liable to pay any new or additional fees or charges or impositions.

**[12]** The appellant had submitted that the learned judge had erred in relying on cl. 25 of the SPA to conclude that the appellant is liable for the payment of the payable GST amount. The offending paragraph of the grounds of the learned judge is this:

> In my mind, with the implementation of GST, the cost to develop the estate would increase with the GST and it is in this manner that the development of the estate is affected

**[13]** It was the contention of learned counsel for the appellant that cl. 25 relates solely to the costs of the development of the commercial housing estate. This was how learned counsel put it:

> The learned Judge erred in his finding that with the implementation of GST [See: ROA [1], page 12, lines 3 to 6], the cost to develop the Estate would increase to include the GST because he failed to consider and also fail to understand that:
>
> (a) on the issue of this case, that is, GST chargeable on the Property sold by the Appellant (Developer) to the Respondents (Purchasers), the Appellant (Developer) is in the position of a supplier of a taxable

supply while his finding on which the decision was based on (that is, "with the implementation of GST, the cost to develop the Estate would increase to include the GST"), the Appellant (Developer) is in, the position of a recipient of taxable supplies, for example, cement, steel, electrical wiring pipes etc;

(b) GST chargeable on the Property to which the Appellant (Developer) is the supplier is an output tax to the Appellant (Developer) while GST on the construction materials (i.e. construction materials are "cost to develop the Estate") is an input tax to the Appellant (Developer). This distinction between output tax and input tax is crucial;

(c) a registered person (Developer) is required to charge GST (output tax) on his taxable supply of goods (the Property) made to his customers (Purchasers). He (Developer) is allowed to claim back any GST incurred on his purchases (construction materials) (i.e. input tax) which are inputs to his business. Therefore, the tax (GST) itself is not a cost to the intermediaries and does not appear as an expense item in their financial statements and therefore the "cost to develop the Estate" would not increase to include the GST as erroneously found by the learned High Court Judge (See: ROA [1], p. 12, line 3 to 6). IT IS SUBMITTED THAT if GST on cement, steel, electrical wiring, pipes etc, being the construction materials for the Estate are not a cost and do not appear as an expense item in the financial statements, then certainly GST on the Property % (i.e. the Property, not something used to develop the Estate) does not increase the cost to develop the Estate; and

(d) GST is a "consumer" tax, and to be collected by the Appellant Developer as a "registered person" under the GST Act for supplying the goods, that is, the Property purchased by the Respondents for payment to the Royal Malaysian Customs;

(e) the Guide on Property Developer Draft as at 11.03.2014 [See: IA (P) @ Tab 1] unequivocally states (quoted *verbatim*)

Goods and Services Tax (GST) is a multi-stage tax on domestic consumption" (emphasis added)

(f) clearly and unarguably, IT IS SUBMITTED THAT without any doubt, the GST is a consumption tax and NOT a development tax or a tax on the development of the Project under the SPA. Nor does it increase the cost to develop the Estate contrary to the finding by the learned High Court Judge [See: ROA [1], page 12, lines 3 to 6];

**[14]** Premised on the above, learned counsel submitted that the learned judge ought to have concluded that cl. 25 of the SPA is not relevant or applicable in determining the issue of GST chargeable on the property as cl. 25 refers to the introduction of any new laws, by-laws, rules or regulations "affecting the development of the estate under the SPA which shall be imposed on the appellant as the developer".

**[15]** We found merit in the submission of learned counsel as when cl. 25 was drafted, neither party would have envisaged the implementation of the GST Act. In any event, a correct construction of cl. 25 would be that any new costs, fees or tax must refer only to the development of the estate. GST as alluded to earlier was non-existent when the sale and purchase agreements were entered into and to impute those costs, fees or tax introduced by new laws to include GST would run contrary to the plain meaning to the words employed in cl. 25. GST payments cannot in any way affect the "development of the estate".

**[16]** Be that as it may, we did not find in favour of the appellant and our reasons were these. GST Act is a law of general application imposed on supplier of goods and services as can be seen from s. 9(3) of the GST Act. In the context of this case, the appellant is liable to pay the GST chargeable. We noted too that s. 9(3) does not provide for the supplier to claim reimbursement the GST paid from the consumer/respondent. In that regard, we departed from the decision of the Singapore case of *Ma Ong Kee And Another v. Kaiyo Reptile Products Pte Ltd* [2001] SGHC 188 which says that there is nothing to preclude the supplier from recovering the GST from the consumer. We found such finding unsupported by the express words of s. 8(3) of the Singapore GST Act which is similar to our s. 9(3).

**[17]** We found that for tax legislation, any imposition of tax on anybody must be expressly provided for. There is no equity in tax jurisprudence. In respect of the SPA, there appeared to be no express provision for the appellant to claim reimbursement of the GST paid from the respondents.

**Conclusion**

**[18]** It is our view that having applied the trite law of construction of statute, it is quite clear that the appellant had no contractual or statutory right to recover any GST liability from the respondents. Even if there is any ambiguity in cl. 25 of the SPA, it did not help the appellant as the *contra proferentum* rule applied, as it is not disputed that the sale and purchase agreement was prepared by the appellant. The *contra proferentum* rule requires the court to construe any ambiguity in the contract document against the party which drafts the ambiguous document.

**[19]** We dismissed the appeal with costs of RM10,000 subject to payment of allocator. Deposit to be refunded.